NAVAJO TRIBE

v.

COMMISSIONER OF INDIAN AFFAIRS

IBIA 81-37-A Decided August 30, 1982

Appeal from decision by Commissioner of Indian Affairs finding a social services corporation doing business within an area designated "near" the Navajo Reservation to be ineligible for a monetary grant under Title II of the Indian Child Welfare Act of 1978.

Affirmed.

1. Indian Child Welfare Act of 1978: Financial Grant Applications: Funding

Under Departmental regulations, areas officially designated to be on or near an Indian reservation are considered part of the reservation for purposes of funding social services programs. Departmental regulations implementing the Indian Child Welfare Act of 1978 do not permit an Indian tribe to combine with a social services corporation within an area designated "near reservation" for social services funding purposes.

APPEARANCES: Lynn Tetterington, Esq., for appellant tribe; Penny Coleman, Esq., Office of the Solicitor of the Department of the Interior, for appellee Commissioner.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On January 26, 1981, the Navajo Tribe (tribe), acting through a tribal committee, authorized a joint application for grant funding under Title II of the Indian Child Welfare Act of November 8, 1978, 92 Stat. 3077, 25 U.S.C. §§ 1931-1934 (Supp. II 1978) (Act) by the tribe acting in combination with the Farmington Inter-Tribal Organization (center), a social services corporation described by appellant as a "multi-service Indian Center incorporated under the laws of the state of New Mexico and situated within the community of Farmington." 1/ The center, among other activities at Farmington, operates a temporary child care center for children between the ages of 6 and 12 and another facility for juveniles. 2/ The tribe, under contract with the Bureau of Indian Affairs (Bureau), provides social services to approximately 150,000 tribal members living within a reservation having an area of 25,000 square miles. 3/ Farmington is located in New Mexico across the San Juan River from the Navajo reservation, but is not directly upon reservation land. 4/ Over 90 percent of all Indians in the Farmington area are of Navajo descent, but other tribes are also represented among the clients of the center. 5/

1/ Appellant's brief at 7.
2/ Id., Exh. “P”
3/ Id. at 10.
4/ Id. at 8; Id., Exh. “O.”
5/ Id., Exh. “P”

On March 13, 1981, the Bureau's Navajo Area Director forwarded for decision to the Commissioner of Indian Affairs a joint application for grant funding under the Act by the tribe and the center together with a memorandum outlining alternative dispositions of the application. On April 10, 1981, the Commissioner decided that only one construction could be given to the application presented by the tribe and the center. In the decision from which the tribe appeals, he stated, based upon analysis of the Act and implementing regulations:

> First, 25 CFR 23.26 states that the Bureau shall only make a grant for an on or "near" reservation program when officially requested to do so by a tribal governing body. "On or near reservation" is defined in 25 CFR 20.1 which is referenced in 25 CFR 23.2(n), as being an applicable definition for the purpose of implementing the Indian Child Welfare Act. Farmington is included in the Navajo's "on or near reservation" designation as published in the Federal Register, and as such the Navajo Nation is eligible to apply for a Title II grant for their designated "on or near reservation" area, part of which may include a sub-grant to Farmington.
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> Second, since Farmington is not an eligible grant applicant the possibility of a consortium is a moot issue. A consortium application as defined in the December 28, 1979 P.L. 95-668 Title II implementation memorandum from my office was "a compilation or coordination of several possible grant applications." This definition is basically the definition of consortium from Webster's dictionary "an agreement or association of the banking interests of two or more nations." Since Farmington is within the Navajo Tribe's jurisdiction they are not an eligible applicant and in turn cannot form a consortium. [6/]

The Act, which provides for grants to Indian tribes and organizations with the stated objective to prevent the breakup of Indian families, is funded through the Snyder Act of November 2, 1921, 42 Stat. 208, as amended,

6/ Apr. 10, 1981, decision of Acting Deputy Commissioner of Indian Affairs.

25 U.S.C. § 13 (1976). Under Departmental rule in effect at the time of the joint application for funding by appellant and the center, an eligible applicant was entitled to a minimum grant of $25,000. 7/ The tribe received a grant of $250,000 following the April 10 decision, which found the tribe alone to be an eligible applicant for funding of a grant for child welfare social services under the Act. 8/ This was the maximum allowable grant permitted an individual grant applicant; a "consortium" of grant applicants could, however, receive as much as $500,000. 9/

While finding the Farmington center to be ineligible to receive grant funding under the Act, the Bureau, in unrelated applications for funding under the Act, found that Flagstaff, and Phoenix, Arizona (both classified,

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7/ Notice, 46 FR 1355 (Jan. 6, 1981).

8/ Federal Brief at 2.

9/ The rule, noticed at 46 FR 1355 (Jan. 6, 1981) provides in pertinent part:

"In order to ensure insofar as possible that all applicants preliminarily approved in a competitive process, under the provisions of 25 CFR Part 23 application and selection criteria established by the Bureau of Indian Affairs, and thereafter approved for funding, receive a proportionate share of available grant funds, the distribution of these funds will be accomplished in accordance with the following formula: Each grant award not to exceed (a) a base amount of $25,000; and (b) an additional amount equal to the product resulting when the estimated unduplicated clientele percentage of the total unduplicated Indian client population to be served by the grant applicant is multiplied by the total amount of grant funds remaining after (a) above is accomplished for all grant applicants approved for funding. In this computation, the total unduplicated Indian client population figure will be based upon the best information available from all grant applications submitted to the Bureau of Indian Affairs and approved for funding, and other identifiable statistical resources when an applicant's client population is questioned.

"The maximum allowable grant award to an individual applicant cannot exceed $250,000.

"The maximum allowable grant award to a consortium cannot exceed $500,000. A consortium is eligible for an amount equal to the amount which the individual members of the consortium could receive if they applied individually, as long as that amount does not exceed the maximum allowable grant award to a consortium listed above."

as was Farmington, to be on or near an Indian reservation for purposes of social services funding), were eligible to receive grant funding under the Act. 10/

On appeal the tribe contends the decision of the Commissioner denying the joint funding application violated substantive and procedural due process and denied the tribe the equal protection of the laws. More specifically the tribe argues, relying on arguments based upon the holding in Morton v. Ruiz, 11/ that (1) use of the term "consortium" by the Bureau in rulemaking denied appellant notice of the requirements demanded of a successful grant applicant and prevented the tribe from adequately preparing a joint application with the center; (2) the center is a qualified applicant and should be allowed to join with the tribe as an equal supplier of social services because the center is an independent organization which serves other Indian groups not members of the Navajo tribe; and (3) payment of grant funds to other "near" reservation communities is unfair to both the tribe and the center since it deprives them of funding which otherwise they should receive. Finally, (4) the tribe contends that the result of the Bureau decision is to inequitably lower funding for social services to the tribe in violation of the Snyder Act. The Board finds the contentions of the tribe to be without merit and affirms the decision of the Commissioner for the following reasons.

[1] In Morton v. Ruiz, cited above, a case relied upon in arguments advanced by both parties, the Court characterizes the question presented as:

10/ Farmington, Flagstaff, and Phoenix are established to be "near" reservations by Departmental rule published at 44 FR 2693 (Jan. 12, 1979). Farmington and Flagstaff are both "near" the Navajo reservation.

11/ 415 U.S. 199 (1974).

a narrow but important issue in the administration of the federal general assistance program for needy Indians:

> Are general assistance benefits available only to those Indians living on reservations in the United States (or in areas regulated by the Bureau of Indian Affairs in Alaska and Oklahoma), and are they thus unavailable to Indians (outside Alaska and Oklahoma) living off, although near, a reservation? [12/ Emphasis in original.]

The Court then goes on to hold Ruiz entitled to benefits although not a resident of an Indian reservation, based upon analysis of Departmental representations to Congress and a consequentially inferred intention of Congress to provide general assistance benefits to a certain class of Indian through appropriations under the Snyder Act. Ruiz was found to represent a class of Indians who live "near" Indian reservations based upon circumstances described thus by the Court:

> The respondents, Ramon Ruiz and his wife, Anita, are Papago Indians and United States citizens. In 1940 they left the Papago Reservation in Arizona to seek employment 15 miles away at the Phelps-Dodge copper mines at Ajo. Mr. Ruiz found work there, and they settled in a community at Ajo called the "Indian Village" and populated almost entirely by Papagos. Practically all the land and most of the homes in the Village are owned or rented by Phelps-Dodge. The Ruizes have lived in Ajo continuously since 1940 and have been in their present residence since 1947. A minor daughter lives with them. They speak and understand the Papago language but only limited English. Apart from Mr. Ruiz' employment with Phelps-Dodge, they have not been assimilated into the dominant culture, and they appear to have maintained a close tie with the nearby reservation. [13/ Footnotes omitted]

Prior to the Court's decision, the Department had excluded Indian persons similarly situated to Ruiz from general assistance benefits based

12/ Id. at 201.
13/ Id. at 202-03.

upon an internal, unpublicized policy. The holding of the Court that Ruiz was entitled to claim benefits was based in part upon a finding that his exclusion from such privilege without prior notice by the Department was a violation of the provisions of the Act of September 6, 1966, 80 Stat. 384, as amended, 5 U.S.C. § 554 (1976). The Court summarized the case holding, concluding:

> The appropriation, as we see it, was for Indians "on or near" the reservation. This is broad enough, we hold, to include the Ruizes who live where they found employment in an Indian community only a few miles from their reservation, who maintain their close economic and social ties with that reservation, and who are unassimilated. [14/]

Following the decision in Ruiz, the Department adopted the policy of recognizing "near" reservation areas by publishing lists in the Federal Register; this policy is expressed in 25 CFR 20.1(r) which provides:

> (r) "Near reservation" means those areas or communities adjacent or contiguous to reservations which are designated by the Commissioner upon recommendation of the local Bureau Superintendent, which recommendation shall be based upon consultation with the tribal governing body of those reservations, as locales appropriate for the extension of financial assistance and/or social services, on the basis of such general criteria as: (1) Number of Indian people native to the reservation residing in the area, (2) a written designation by the tribal governing body that members of their tribe and family members who are Indian residing in the area, are socially, culturally and economically affiliated with their tribe and reservation, (3) geographical proximity of the area to the reservation, and (4) administrative feasibility of providing an adequate level of services to the area. The Commissioner shall designate each area and publish the designations in the FEDERAL REGISTER.

14/ Id. at 238.

Thus, the Department by regulation provides for extension of social services to persons within the definition of the class of persons found in Ruiz to be entitled to receive benefits funded by the Snyder Act. This class of eligibles is referred to as "near reservation" clientele. The definition of the class is clear. The manner by which the class is to be determined is also clearly defined by the rule.

In this case, the consultation required by the regulation was done with the Navajo Tribe, with whom the Bureau had contracted for social services to be funded under the Snyder Act within the reservation area. 15/ The tribe recommended that Farmington and Flagstaff be included within the tribal service area as "near" to the tribe's reservation. 16/ On January 12, 1979, the tribal recommendation was adopted by notice published in the Federal Register designating Farmington and Flagstaff to be "near reservation" locales appropriate for the extension of BIA financial assistance and/or social services. 17/

It is in the context of this factual and legal background that the tribe, on January 26, 1981, reciting: "[a]ny recognition of the Farmington Inter-Tribal Indian Organization as a 'on or near' reservation organization would result in the depletion of funds available to the Navajo Tribe"

15/ See Memorandum dated Feb. 11, 1977, Acting Deputy Commissioner of Indian Affairs, subject: 25 CFR 20--Financial Assistance and Social Services Program.
16/ Navajo Resolution CAP-28-78 dated Apr. 25, 1978.
17/ 44 FR 2693 (Jan. 12, 1979).

resolved that "[t]he Navajo Tribe makes an agreement to form a Indian Child Welfare Act consortium with an off-reservation Indian Organization, the Farmington Inter-Tribal Indian Organization." 18/

The tribe now argues that the Bureau misled the tribe and the center into making a joint application for funding under the grant provisions of the Indian Child Welfare Act by use of the word "consortium" to define a combination of applications. According to this rationale, both applicants were led by this use of alleged inartful language to believe they could form a combination or "consortium" in order to supply social services under the Act to Farmington. This belief was also based in part upon the fact that the center is independent from the tribe and is an otherwise qualified social services organization. This argument misconstrues the foundation of the Ruiz holding and the subsequent adoption of the case doctrine by Departmental rule for the delivery of social services to Indians near reservations. It is the character of the client population to be served, rather than the composition of the servicing organization, that is crucial to a determination under the Act regarding funding of Indian social services.

In this case, Farmington was previously declared by Federal Register notice dated January 12, 1979, to be "near" the Navajo reservation. The tribe, in consultation with the Bureau had, prior to publication of the notice, declared its ability and desire to include the Farmington community within the tribal social services area in order to obtain Bureau social services funding. However, part of the client population served by the tribe in

18/ Resolution of Navajo Tribal Council Committee dated Jan. 26, 1981.

Farmington is also served by the center. While it is true the center serves others who are not members of the tribe, it is apparent that in Farmington the tribe and the center serve the same Navajo client population. The funding of more than one social services agency for any area designated to be "near" a reservation is specifically prohibited by Departmental regulation in effect at the time the tribe resolved to join with the center in an application for funding:

> Selection for grants under this part for on or "near" reservation programs shall be limited to the governing body of the tribe to be served by the grant. However, the governing body of the tribe may make a subgrant or subcontract with another organization entity including but not limited to an Indian organization, subject to the provisions of § 23.36. [19/]

As explained in a later Federal Register notice, the Department desires to avoid duplication of services to a single client population. 20/ This later notice emphasizes the earlier declared policy of the Department to discourage the duplication of services to a single client population as declared at 25 CFR 23.25:

> (a) The Commissioner or designated representative shall select for grants under this part those proposals which will in his or her judgment best promote the purposes of title II of the Act taking into consideration insofar as practicable the following factors:
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> * * * * * *
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> (3) The extent to which the proposed program would duplicate any existing child and family service program emphasizing prevention of Indian family breakup.

19/ 25 CFR 23.25(b).
20/ See note 9, supra.

Thus, the regulations in effect when the joint funding application was made provide that in "near" reservation areas the designated responsible tribe is to supply qualified clients benefits under the Act. The tribe may, where appropriate, subcontract the supply of social services to an organization such as the center; however, the principal responsibility for the "near" area remains with the tribe concerned. Thus, the Bureau will only deal with a tribe, in cases involving the funding of social services for "near" reservation Indian populations served by a tribe.

While appellee acknowledges the Bureau granted funding to nontribal community services in Phoenix and Flagstaff in violation of this policy, 21/ such error does not entitle the tribe to similar error in violation of Departmental regulation--the Department is bound by law to follow Departmental regulations. 22/

Finally, appellant's complaint that the result of the Commissioner's decision in this case is to reduce grant funding to the tribe is without foundation in fact. The tribe received $250,000 from the Department for funding of Indian Child Welfare services by way of grant. Had the center been found to be a qualified applicant entitled to a grant in its own right, a combined grant to both applicants might have exceeded this amount. However, since the center is located within the tribe's service area it is not qualified to be an independent recipient of funding since it does not serve a

21/ Appellee's brief at 9.
22/ Aleutian/Pribilof Islands Association, Inc. v. Acting Deputy Assistant Secretary, 9 IBIA 254, 260, 89 I.D. 196, 199 (1982).

client population in an area that is not served by a tribe. The failure of the center to qualify for grant funding under these circumstances does not reduce the funding capability of the tribe in any way.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Commissioner, dated April 10, 1981, is affirmed.

This decision is final for the Department.

Franklin D. Arness
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

Jerry Muskrat
Administrative Judge